COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2013-SC-000828

HON. ANN BAILEY SMITH (CHIEF JUDGE, JEFFERSON DISTRICT COURT) — APPELLANT

v.

COMMONWEALTH OF KENTUCKY, *ex rel.* MICHAEL J. O'CONNELL, et al. — APPELLEES

APPEAL FROM JEFFERSON CIRCUIT COURT
Honorable Judith McDonald-Burkman
No. 13-CI-003689

BRIEF FOR APPELLANT HON. ANN BAILEY SMITH, CHIEF JUDGE, JEFFERSON DISTRICT COURT

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been served upon the following, by U.S. Mail, on this the 16th day of June, 2014: Samuel P. Givens, Jr., Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, Kentucky 40601, Hon. Judith McDonald-Burkman, Judicial Center, 700 W. Jefferson St., 8th Floor, Louisville, Kentucky 40202, David A. Sexton, Assistant Jefferson County Attorney, Fiscal Court Building, 531 Court Place, Suite 900, Louisville, Kentucky 40202, J. Bruce Miller, J. Bruce Miller Law Group, 325 W. Main St., 20th Floor, Louisville Kentucky 40202, and Michael J. O'Connell, Jefferson County Attorney, Jefferson Hall of Justice, 600 W. Jefferson St., Louisville Kentucky 40202

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INTRODUCTION

This appeal from an extraordinary Writ concerns the authority of district courts to impose court costs, as RCr 8.04 has always authorized, after an amendment to KRS 186.574 that says nothing about court costs in providing for an offender's diversion into a traffic safety program upon payment of a fee to the county attorney. Under governing principles of statutory interpretation and constitutional law, the Writ was erroneously issued.

STATEMENT CONCERNING ORAL ARGUMENT

This appeal presents an issue of first impression and of public importance: Whether a new section added to KRS 186.574, allowing county attorneys to offer traffic safety programs for a fee, can strip the district courts of their long-standing authority to impose court costs under RCr 8.04 when traffic cases are diverted and, subject to conditions, subsequently dismissed. Court costs generate millions of dollars for allocation to the General Fund and many worthwhile organizations. Under the Writ, these dollars will disappear, and fees will be paid instead to the county attorneys. Appellant respectfully submits that the stakes merit oral argument.

STATEMENT OF POINTS AND AUTHORITIES

May It Please The Court:

> *"We alone are the final arbiters of our rules of 'practice and procedure.'"*[1]

Contrary to this Court's recent and unequivocal reminder, the Jefferson Circuit Court has issued a Writ of Prohibition against the Appellant Jefferson District Court that forbids the imposition of court costs in thousands of traffic cases annually in Jefferson County. As authority for restricting the District Court's power to administer justice, the Writ rests on a 2012 amendment that the General Assembly tacked onto KRS 186.574, which allows county attorneys to establish "traffic safety programs" where defendants are "diverted" from prosecution. That new subsection – KRS 186.574(6) – says nothing about court costs. But this Court's Rule of Criminal Procedure ("RCr") 8.04 expressly allows the district courts to impose "conditions that could be imposed on probation," which would include court costs.

The imposition of court costs on traffic offenders generates millions of dollars for the General Fund and many worthwhile organizations as statutorily allocated. Courts should not construe an amendment that is silent on court costs to wipe out the enormous benefit of court costs, which the Writ essentially redirects to county attorney coffers. An amendment that says nothing about court costs should not trump this Court's Rule authorizing court costs, RCr 8.04, which the Circuit Court fails even to mention, relying instead on statutes that only apply to circuit courts, not to district court proceedings under RCr 8.04. This Court should vacate the Writ.

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[1] *Glenn v. Commonwealth,* ___ S.W.3d ___, 2013 WL 6145231 (Ky. 2013), 2012-SC-000499-MR, attached hereto as App. N. This case became final and ordered TO BE PUBLISHED on February 20, 2014 but no Southwest Reporter citation is currently available.

STATEMENT OF THE CASE

Appellant Ann Bailey Smith, Chief Judge of the Jefferson District Court, first encountered a traffic safety program under KRS 186.574(6) when the Appellee Jefferson County Attorney, Michael J. O'Connell, appeared in traffic court arguing that (i) he alone had the power to dismiss the traffic charge against Appellee Timothy Higgins, and (ii) the District Court had no power to impose court costs under RCr 8.04 because Mr. Higgins had paid $150 to the County Attorney for participation in Drive Safe Louisville. Noting that KRS 186.574(6) did not prohibit court costs, and finding that courts alone have the power to dismiss cases under RCr 9.64, Judge Smith exercised her authority to dismiss the charge against Mr. Higgins on the condition that he pay court costs under RCr 8.04 (June 25, 2013 District Court Opinion and Order ("Order") App. B, hereto). Granting Appellees' subsequent petition, on November 15, 2013, the Jefferson Circuit Court issued a Writ of Prohibition to bar the imposition of court costs in all cases in which a defendant pays the County Attorney to participate in a "no points" traffic safety program (App. A, hereto). The undisputed statement of this case thus begins with discussion of the power of the courts, and turns on the interaction of RCr 8.04, 9.64, and KRS 186.574(6), within the bounds of statutory interpretation and constitutional law.

Controlling Rules. Section 116 of the Kentucky Constitution provides that the "Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, . . . and rules of practice and procedure for the Court of Justice." Ky. Const. §116. This Court has prescribed the Kentucky Rules of Criminal Procedure and pronounced: "These rules govern procedure and practice in all criminal proceedings in the Court of Justice." RCr 1.02 (2).

Under RCr 9.64, the Court, not the prosecutor, decides whether to allow dismissal of a pending case. RCr 8.04 governs "pretrial diversion" and allows the Commonwealth and the defendant to suspend a prosecution under certain circumstances, again, "subject to approval of the trial court."

> (1) Generally. The attorney for the Commonwealth and the defendant may agree, **subject to the approval of the trial court,** that the prosecution will be suspended for a specified period after which it will be dismissed on the condition that the defendant not commit a crime during that period, or other conditions agreed upon by the parties. The agreement (or any mutually agreed upon subsequent modifications to the agreement) must be in writing and signed by the parties.

(emphasis added).

RCr 8.04(2) also allows the trial court to order "conditions that could be imposed upon probation." Under KRS 533.030(2)(g), governing "conditions of probation," the Court may "in addition to any other reasonable condition" require the defendant to "pay the cost of the proceeding as set by the court." Court costs and fees for a traffic case amount to $134.

Court Costs. Entitled "Court costs for criminal cases in District Court – Payment required – Exceptions," KRS 24A.175(1) states: "Court costs for a criminal case in the District Court **shall be** one hundred dollars ($100), regardless of whether the offense is one for which prepayment is permitted" (emphasis added). "Prepayment" is necessarily "pre"-adjudication and therefore a Court can impose court costs regardless of whether an offender elects diversion or trial. KRS 24A.175(2) exempts parking citations from the payment of court costs under defined circumstances, and subsection 3 makes court costs "mandatory" in certain cases upon "conviction." In all other criminal cases, including diversion under RCr 8.04, the imposition of court costs remains a condition that "may" be imposed.

In addition to $100 in court costs, KRS 24A.176(2) imposes a $20 fee for local governments and counties to be used for police, jails and transport of prisoners. KRS 24A.1765 adds a $10 fee for the general fund and a "telephonic behavioral health jail triage system," and KRS 172.180 and 453.060(3) combine to add a $4 fee that is produced to the county law library – all combined equals $134.

The payment of $134 upon order of dismissal in one case may not individually appear to be a matter of immense public importance, but the total amount of court costs and fees in Jefferson County is substantial. For Fiscal Year 2012 in Jefferson County, the website for the Administrative Office of the Courts ("AOC") lists 20,501 "District Court Pre-payable Caseload" filings for traffic cases.[2] Multiplying 20,501 projected cases by $134 equals $2,747,134 in court costs available for funding from Jefferson County alone, not taking into account the amount available for court costs paid in other counties. Even if only half of those paid, the amount remains substantial.

The chart attached as Appendix E illustrates how court costs would be allocated based on 2012 AOC filings. From Jefferson County alone, for example, over $130,000 would be paid to the Spinal Cord and Head Injury Trust Fund, over $100,000 to the Traumatic Brain Injury Trust Fund, nearly $70,000 to the Crime Victims' Compensation Fund, over $200,000 to Jefferson County Sheriffs, over $100,000 to the circuit clerks, over $300,000 to local governments with police departments, over $100,000 to the Cabinet for Health and Family Services, and over $1 million to the General Fund.

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[2] *See* App. M, hereto, for AOC 2012 data on Jefferson County District Court filings, which was attached as App. 8 to Judge Smith's August 12, 2013 Response to the Appellees' Petition for Writ of Prohibition or Mandamus in the Circuit Court ("Response"). This Court should take judicial notice of data on the AOC website, under KRE 201(b)(2), because the information is obviously "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

The Amendment. The Writ eliminates the distribution of funds to all these court cost beneficiaries in favor of a payment to county attorneys. It relies on KRS 186.574(6)(a), effective July 12, 2012, which provides that "a county attorney may operate a traffic safety program for traffic offenders **prior to the adjudication** of the offense" (emphasis added). It does not require dismissal or define "adjudication," which could mean dismissal or some other disposition. An "adjudication" certainly can result in the payment of court costs because KRS 24A.175(1) provides for court costs "regardless of whether the offense is one for which prepayment is permitted."

KRS 186.574(6)(c) vaguely outlines the general parameters of a traffic safety program. Other than "safety," it gives no direction whatsoever regarding the content of the programs, and the content varies across the 60-70 counties in Kentucky that have implemented "safety programs." (*See* Summary of County Attorney Traffic Safety Programs in Kentucky, App. G, hereto) KRS 186.574(6) says the County Attorney may "charge a reasonable fee to program participants, which shall only be used for payment of county attorney office operating expenses," and the fee also varies from county to county. *See* 2013 Annual Report of County Safety Programs to Prosecutors Advisory Council, App. H, hereto. KRS 186.574(6)(c) also requires, by October 1 of each year, that the County Attorney report to the Prosecutors Advisory Council both the fee charged and the total number of traffic offenders "diverted" into the county attorney-operated safety program for the preceding calendar year (App. H). Under KRS 186.574(6)(d), the participant pays a $25 "fee" to the court clerk. Nowhere does KRS 186.574(6) limit the trial court's ability to dismiss diversion cases on the condition that court costs are paid. KRS 186.574(6)(a) is bare bones, contemplating merely a "traffic safety program for traffic offenders prior to the adjudication of the offense."

Drive Safe Louisville. With nothing more than the General Assembly's sparse direction, the Jefferson County Attorney implemented Drive Safe Louisville, with PSI Kentucky (Public Safety Institute) "to provide the educational component of this program." In form letters mailed to traffic law violators, the County Attorney advises: "[*You*] *may be eligible to participate in this program instead of appearing in court.*" *See* Order at 4 and Attachment #1 (italicized in original)). He assures the participant there is no need to appear in court, despite RCr 8.28(1), which requires a defendant's appearance in court. *See also* RCr 8.28(4) ("**the court may permit** . . . the defendant's absence" (emphasis added)). He promises that the citation will be dismissed, no points will be assessed to a license, no violation will appear on any record for insurance purposes, and no fine or other expenses will be assessed (See App. 4.).

The letter refers the participant to www.drivesafelouisville.com to review the program online, which cannot be accessed without a citation and a "control number." A DVD of the Drive Safe Louisville program is attached as Appendix F.[3] The County Attorney's letter states that the "program cost" is $150, payable to his office, and the program requires "less than 2 hours." But it also "may be completed as your schedule allows." The defendant pays $150, which is allocated $76 to the County Attorney, $49 to the private vendor who provides the "online" program (consisting of, *inter alia*, true/false and multiple choice questions that can be answered more than once and links to

[3] Because there is no "document" *per se* showing the online program, the County Attorney produced the DVD in Appendix F in response to an Open Records request. If an offender does not have access to the internet, he or she receives the DVD, which is not identical to the online presentation, but the content is substantially the same.

accident videos), and $25 to the circuit clerks.[4] Using the 20,501 prepayable case load filings in 2012 as an estimate (App. M), it is clear that county attorney offices can profit substantially from a safety program. If we multiply 20,501 x $150, the total paid from Drive Safe Louisville annually could be $3,075,150: $1,558,076 to the Jefferson County Attorney's office, $1,004,549 to the private vendor, and $512,525 to the circuit clerk's office. KRS 186.574(6) restricts the use of the fees a county attorney may charge participants in traffic safety programs, saying that the fees must be directed to "payment of county attorney office operating expenses." As discussed below, the vagueness of the statute – in particular, the phrase "county attorney office operating expenses" – makes it unclear whether the County Attorney is appropriately allocating the fees he receives from program participants.

The record here does not reveal how or whether the $150 fee is reasonable. The amount a defendant pays for participation in the safety program – just like the content of the program – varies across the 60-70 counties that have adopted a KRS 186.574(6) program (*see* App. H). The amount a defendant pays therefore depends on which county he or she gets pulled over and handed a ticket. Fees vary, for example, from no charge in Robertson County, $50.00 in Franklin County, $75.00 in Shelby County, up to $150.00 in Jefferson and two other counties, with the highest fee of $175.00 in Fayette County (*id.*).

Judge Smith expressed other "concerns regarding Drive Safe Louisville that need to be discussed in order to determine whether the dismissal under RCr 8.04 (Pretrial Diversion) or RCr 9.64 would be required, appropriate, and legally allowed in this case"

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[4] *See* App. F, hereto for July 31, 2013 PSI letter to County Attorney obtained pursuant to Open Records request, and County Attorney's written Response to the request, which was attached as App. 3 to Judge Smith's Response below.

(Order at 18). For example, "there appears to be no verification that the person who is cited for the traffic offense is actually the person who watches the video and answers the questions. The prosecutor could have the person cited sign a sworn statement that he is the one who actually viewed the program on line and then submit the sworn statement to the court at the time a motion to dismiss is made." (*id.*) Alternatively, "the court could bring the defendant to court and have him swear under oath that he did in fact view the program prior to granting a motion to dismiss" (*id.*).

Drive Safe Louisville appears to have no provision to include "a person who is unable to pay the $150.00 fee to participate:"

> If the primary goal of Drive Safe Louisville is, according to its website, "to review traffic laws and safe driving habits" and make the community safer (See [Order] Attachment #2) then there should be a mechanism in place to allow poor individuals to participate on a sliding scale based upon ability to pay or waive the fee entirely in the case of indigence. Poor people also receive uniform citations for traffic violations. If the prosecutor allows poor individuals to participate then this court would under the law likewise be obligated to waive or reduce court costs and the court would do so (Order at 18-19).

The District Court also noted that Drive Safe Louisville appears to make no allowances for "potentially incriminating responses:"

> [Its website sets forth] the questions given to an applicant to answer to be considered for its program. (See [Order] Attachment #12). An applicant must answer among other questions, 'did you have a valid operator's license," "was your vehicle properly registered," and "did you have a valid policy of automobile insurance on the vehicle." Nothing on the website or in the letter which the prosecutor sends out informs the applicant, who presumably is unrepresented by counsel, that should he not be accepted into the program then his answers could be used in the prosecution of his case in court, or that the prosecutor agrees to not use the answers if the applicant is not accepted into the program (Order at 19).

Proceedings Before Judge Smith. Appellee Higgins was pulled over for speeding on March 1, 2013 at 5:49 a.m. while on his way to the Persimmon Ridge Golf Club for an event. A Louisville Metro Police Department Officer issued a traffic citation:

> Observed vehicle traveling at a high rate of speed. Confirmed speed by radar mounted in patrol vehicle #6174 while stationary on side of roadway. Subject vehicle was visually fastest and closest at time of reading.

(March 22, 2013 Uniform Citation, App. L, hereto, which was App. 7 to Judge Smith's Response below). The citation set Mr. Higgins' court date for "March 22, 2013, at 7:00 p.m." (Order at 2). Thereafter, he received the County Attorney's form letter inviting him to pay $150 and participate in Drive Safe Louisville.

Mr. Higgins did not appear in court on March 22 because, despite all Rules to the contrary, the County Attorney's Office told him that he need not do so (Order at 2; March 22, 2013 Hearing DVD, App. J, hereto, which was App. 5 to Judge Smith's Response below). When Mr. Higgins' case was called, the Assistant County Attorney simply handed the case jacket to Judge Smith, already stamped by his office as "Dismissed DSL Complete" (App. I, hereto, which was App. 4 to Judge Smith's Response below). It was a "done deal" unilateral dismissal by the County Attorney in violation of RCr 9.64 (App. J hereto, videotape, hereafter "VT," 3/22/13, 6:53:48-6:54:12; *see also,* stamp on case jacket, App. I). Judge Smith continued the case and ordered the defendant to appear on April 30 (Order at 2).

At that hearing, this time with Mr. Higgins present, County Attorney Michael O'Connell insisted that the Court had no role when a defendant participates in Drive Safe Louisville (Order at 3; April 30, 2013 Transcript of Proceedings ("Tr."), App. K, hereto, which was App. 6 to Judge Smith's Response below). He argued that RCr 8.04 does not apply because Drive Safe Louisville is not a "diversion" program. The belated argument was necessary because if Drive Safe Louisville is a diversion program, RCr 8.04 clearly authorized the imposition of court costs. But Drive Safe Louisville could not be anything but diversion under the Rule.

Of course, Mr. Golden, the Assistant County Attorney who argued the case on March 22, had already advised the Court that Drive Safe Louisville was a "diversion" program (March 22, April 30, 2013 Hearing DVDs, App. J hereto, which were App. 5 to Judge Smith's Response below; April 30 Tr. at 2). He was "well-prepared and relied on notes in making his comments and arguments" (Order at 5), conceding on multiple occasions that Drive Safe Louisville was a diversion program.

> This particular defendant entered into an agreement with the Commonwealth to participate in a **diversion program** that is specifically permitted by statute. (Emphasis added) (VT, 3/22/13, 6:45:14-6:45:25).

(Order at 6).

> Namely, traffic offenses are delineated and set forth separate from all other statutes, separate from all other crimes, and allow the County Attorney to establish a **diversion program**. (Emphasis added). (VT, 3/22/13, 6:45:25-6:45:34).

(*Id.*).

> There is no other enabling statute that would allow any type of **diversion program** set forth by the County Attorney. (Emphasis added) (VT, 3/22/13, 6:45:34-6:45:45).

(*Id.*). KRS 186.574(6)(c)(2), the enabling statute itself, requires county attorneys to report the number of traffic offenders "diverted" into the program (*see* App. H).

Moreover, traffic programs under KRS 186.574(6), like Drive Safe Louisville, meet the definition of a diversion program under the Standards of the National Association of Pretrial Services Agencies, the National District Attorney's Association, and the National Survey of Pretrial Diversion Programs and Practices (*see* Order at 6-7, Attachment #s 3, 4, and 5). As Judge Smith found, traffic programs in other counties are recognized – indeed denominated – "diversion" programs (Order at 7, Attachment #s 6, 7, 8, 9, 10):

Kenton County Attorney – "CATS **Diversion** Program" (See Attachment #6).
Fayette County Attorney – "Traffic **Diversion** Program" (See Attachment #7).
Madison County Attorney – "Traffic **Diversion** Program" (See Attachment #8).
Campbell County Attorney – "**Diversion** program for traffic citations" (See Attachment #9).
Pendleton County Attorney – "**Diversion** program for minor traffic offenses" (See Attachment #10).

The County Attorney could not differentiate these programs from Drive Safe Louisville (Order at 8; VT, 6/10/13, 7:00:20-7:00:35), and he could not deny that court costs are paid in at least one of those counties:

> [T]he Pendleton County Attorney also conducts a traffic safety program under KRS 186.574(6). The Pendleton County Attorney refers to his program as a "diversion program." Ultimately the traffic charge is dismissed and the Pendleton County Attorney charges a fee for the program "**plus court costs.**" (Emphasis added). (See Attachment #10).

(Order at 14).

The County Attorney Office itself had a long-standing practice of providing for court costs in traffic diversion cases (*see* Order at 13-14). In a number of speeding cases that were on the court's docket prior to the inception of Drive Safe Louisville, the County Attorney recommended that (i) the defendant enter a plea of not guilty, (ii) the case be passed for a period of six months on the condition of no new tickets and payment of court costs, and (iii) upon the satisfactory completion of those conditions, the prosecutor would move the court to dismiss the speeding charge. (April 30 DVD, Tr. at 6-7).

On the very day of Mr. Higgins' hearing, there was another "diversion" case on the court's docket involving a Mr. Brooks, who paid court costs on the prosecutor's motion.

> The prosecutor now suggests that court costs can never be assessed if a case is being dismissed. This is contrary to the long-standing practice of the Jefferson County Attorney's office. At the hearing on this case on April 30, 2013, the court pointed out case number ten (10) on the court's docket, Joseph Brooks, 12T067113. (VT, 4/30/13, 7:17:50). In that case on November 1, 2012, a plea of not guilty was entered and the prosecutor

> recommended passing the case to April 30, 2013, on the prosecutor's motion to dismiss, with the condition of no new tickets and payment of court costs. (See Attachment #11). The case was called on April 30, 2013, and dismissed since Mr. Brooks had no new tickets and he had paid the court costs. Furthermore, at the previous hearing on the defendant's case on March 22, 2013, the court pointed out to the Assistant County Attorney that his office recommends dismissals of many cases on conditions which include the payment of court costs. The Assistant County Attorney agreed. (VT, 3/22/13, 6:58:03-6:58:41; 6:59:58-7:01:16; 7:06:12-7:06:25).

(Order at 13-14).

Given the law and the County Attorney Office's "long-standing practice," Judge Smith concluded that "Defendants should be treated equally."

> As to the imposition of court costs, the defendant in this case should be treated the same as other defendants, for example Joseph Brooks. Mr. Brooks' case was dismissed and he paid court costs and so should this defendant.

(Order at 14). Because court costs are assessed in many cases involving diversion, Judge Smith reasoned: "So I don't know why we would single out a certain group of people coming into the court system" and exempt them from paying court costs; "Drive Safe Louisville, Marijuana Education, pass six months, no new tickets, dismiss – court costs should be imposed across the board. They are either imposed across the board or not at all" (*Id.*; Tr. at 10). Mr. Higgins never claimed that he is indigent and unable to pay court costs. Neither the County Attorney nor Mr. Higgins claimed that he was wrongfully accused of speeding or that the County Attorney would be unable to obtain a conviction (Order at 14).

The County Attorney has motive to oppose court costs because avoiding payment of court costs encourages more traffic offenders to pay $150 to him for participation in Drive Safe Louisville. To support his position, the County Attorney relied on a letter from an Assistant Attorney General that admittedly was "not a formal Opinion of the

Attorney General" and saw no reason why a court should be entitled to fees when it takes no part in the adjudication of traffic offenders (Order at 15). The author is wrong. "[T]hese cases now appear on the court's dockets on a daily basis in Jefferson County and require a disposition by the court for finality and, thus, to have the case removed from the court's docket. The statement by the Assistant Attorney General indicates a flawed and fundamental misunderstanding of 'court costs' and how court costs are distributed" (Order at 15-16). Judge Smith explained: "Most of our local courts under that old system depended upon the collection of fines and fees to pay their operation. The new system under the Judicial Article in 1976 improved public confidence in the courts. 'COURT COSTS' DO NOT GO TO THE COURTS. A substantial portion of court costs now go to the State's General Fund" (Order at 16).

And, in addition to the prosecutor's office, other agencies and individuals participate in a safety program case:

> As to the case before the court several agencies that participated would also receive a portion of the court costs. The agencies are as follows with the statute in parenthesis which directs the distribution of the court costs: the defendant received a citation from the Louisville Metro Police Department (see KRS 24A.176(4) and (5)), a case number was assigned, a case jacket created by the clerk's office and a clerk has been in court each time the defendant's case has appeared on the docket (see KRS 42.320(2)(e)), and Deputy Sheriffs have been in court each time that the case has been on the docket (*see* KRS 42.320(2)(i)).

(Order at 16). Judge Smith concluded: "It is important to Kentucky and to Jefferson County for the court to assess court costs when appropriate" (Order at 17).[5]

[5] The County Attorney similarly relied on an email from General Counsel for the Administrative Office of the Courts. But the author of the email is "not a judge or an appellate court" (Order at 17). His view is simply one perspective and no one knows what, if any, inquiry or research he performed. The email is as unconvincing as the informal Assistant Attorney General letter.

The District Court's Opinion. After three hearings and consideration of all arguments presented, Judge Smith made Findings of Fact and Conclusions of Law in a thorough 22-page Opinion and Order (App. B). Based on the language of the statute, KRS 186.574(6), which uses the word "diverted," the admission of the Assistant County Attorney that Drive Safe Louisville is a "diversion" program, national standards defining "diversion" programs, and the undisputed fact that other Kentucky counties deemed their KRS 186.574 programs "diversion," Judge Smith found Drive Safe Louisville to constitute "diversion" under RCr 8.04 (Order at 3-8).

Judge Smith thus imposed court costs, noting that "diversion agreements routinely include court costs" (Order at 13). It is a "long-standing practice of the Jefferson County Attorney's office" (*id.*).

> Under the facts of this case the prosecution set up a diversion program without court approval, implemented the program, and now moves to dismiss in an attempt to avoid the mandatory requirement of "approval of the trial court" under RCr 8.04(1). This court has the authority to grant belated approval of the diversion program (Drive Safe Louisville) in this case and require payment of court costs.

(*Id.*). Judge Smith ordered:

> Upon payment of court costs by the defendant in the amount of $134.00, the court will grant belated approval for the use of the traffic diversion program, known as Drive Safe Louisville, and dismiss the uniform citation under RCr 8.04(5). Alternatively, upon the payment of those court costs by the defendant, pursuant to RCr 9.64, the court will grant the prosecutor's motion to dismiss the uniform citation.

(Order at 21-22). To accept the County Attorney's reasoning to the contrary, Judge Smith concluded, would result in an unconstitutional outcome. Based on the law established under Ky. Const. §§27, 28 and 116, "[i]f this court were to accept the prosecutor's logic then this court would be compelled to declare KRS 186.574(6) unconstitutional as a violation of Separation of Powers since that would clearly infringe

on the powers of the Judicial Branch pursuant to the Constitution of Kentucky" (Order at 10).

The Circuit Court's Writ. Objecting to Judge Smith's Order, the County Attorney filed a petition for writ of prohibition in the Jefferson Circuit Court. In its four-page order issuing the Writ, the Circuit Court relied on only one section of KRS 24A.175 – subsection 3 – that makes court costs mandatory in certain cases upon "conviction," and concluded that court costs can only be awarded when a defendant is convicted, not when charges are dismissed upon satisfaction of certain conditions (Writ at 2, App. A). The Circuit Court does not address KRS 24A.175(1) that provides for court costs "regardless if the offense is one for which prepayment is permitted." Just because court costs are mandatory in some cases does not make court costs completely prohibited in other cases, such as those under RCr 8.04, which governs "diversion" and allows the imposition of court costs.

The Circuit Court also concluded that a traffic safety program is "not intended to be a pretrial diversion program" despite all undisputed evidence in the record – including the admission of the Assistant County Attorney – that the traffic safety program involves pre-trial diversion, just like many other diversion cases under RCr 8.04. Judge Smith's factual finding is entitled to great deference. Under CR 52.01, an appellate court "shall not" set aside the trial court's findings of fact unless they are clearly erroneous. *See also Commonwealth v. Deloney*, 20 S.W.3d 471, 473-74 (Ky. 2000) ("If the trial judge's findings of fact in the underlying action are not clearly erroneous, *i.e.,* are supported by substantial evidence, then the [reviewing] court's role is confined to determining whether those facts support the trial judge's legal conclusion.").

Similarly, the Circuit Court relied on letters from state representatives about the amendment to KRS 186.574, even though the law is well settled that "legislative intent may not be garnered from parol evidence, especially parol evidence furnished by a member of the legislature, itself." *Bd. of Trustees of The Judicial Form Retirement Sep. v. Atty. Gen. of Commonwealth*, 132 S.W.3d 770, 786 (Ky. 2003).

Pointing likewise to KRS 533.250(1), the Circuit Court concludes that court costs are imposed only upon a "conviction" (Writ at 2). But KRS 533.250 only applies to diversion in Circuit Court, specifically to persons charged with Class D felonies who meet certain criteria. All references to prosecutors are to the "Commonwealth's Attorney," and subsection 6 provides that the Commonwealth Attorney's recommendation goes to the Circuit Judge "in the court in which the case would be tried." By definition, a Circuit Judge will only be in Circuit Court, and the only criminal cases that would be tried are felony cases that are never tried in district courts.

KRS 533.262(1) states that, except for drug court, its pretrial diversion is the only such program permitted in circuit courts. But KRS 533.262(2) expressly permits diversion in district courts. "As of July 15, 1998, the only other pretrial diversion programs utilized by the Commonwealth shall be those authorized by the Kentucky Supreme Court and providing for the pretrial diversion of misdemeanants." This Court has provided for diversion in district courts under RCr 8.04.

While the Circuit Court accepted *in toto* the County Attorney's demand for a prohibition of court costs, it rejected his argument that he had the power to dismiss cases unilaterally without court involvement (Writ at 4). The Circuit Court agreed that such action "circumvents the authority of the court under RCr 9.64, which requires permission of the court for the dismissal of indictments and uniform citations" (*id.* at 3-4). While the

County Attorney may move for dismissal, "it is the court that is vested with the authority to grant or deny based upon a fair consideration of all relevant concerns. *Gibson v. Commonwealth*, 291 S.W.3d 686, 691 (Ky. 2009)(internal citations omitted)" (*Id.* at 4). The County Attorney filed no cross appeal from this ruling. It therefore is not an issue on review here.

Recognizing the District Court's power under RCr 9.64, but ignoring its authority under RCr 8.04, the Circuit Court ordered: "The Jefferson District Court shall dismiss the citations of Drive Safe Louisville participants upon successful completion of the program and motion of the Jefferson County Attorney's Office, without payment of court costs, unless there exists articulable reasons for denial" (Writ at 4). The Circuit Court did not disclose what those "articulable reasons" might be. Judge Smith sought emergency relief to stay the Writ pending appeal, which the Circuit Court denied.

The Court Of Appeals' Proceedings. Judge Smith then appealed and asked the Court of Appeals to grant emergency relief to stay the Writ and to transfer the appeal to this Court. The Court of Appeals entered an Order Granting Emergency Intermediate Relief ("Intermediate Relief Order," App. D, hereto). The Court found that irreparable injury would result if it did not stay the Writ. "Once the participants in the Drive Safe program had their cases dismissed, the costs associated with those cases would be forever lost to the Commonwealth should the Circuit Court's interpretation of the statute be reversed" (Intermediate Relief Order at 5).

The Court also found that "the equities clearly favor a stay in that a stay will merely preserve the *status quo* . . . " (*id.*). The Court was "convinced that the public interest will be best served by ensuring that public funds in the form of costs are properly imposed and applied while awaiting the resolution of this litigation" (*id.* at 6). The Court

expressed its opinion that "a substantial question of statutory construction has been raised," namely, "the statute as interpreted appears to be in direct conflict with the authority granted the district court by the criminal rules over dismissal of indictments and citations" (*id.*).

In its separate Order recommending transfer (App. C, hereto), the Court of Appeals explained the importance of the issues presented.

> The matter of great and immediate public importance is the potential lost revenue to the state treasury should the circuit court's interpretation of KRS 186.574(6) be reversed. The issue is of state-wide importance because programs similar to Drive Safe Louisville have been established in many counties across the Commonwealth. It appears from the sparse record before this Court that some counties are assessing court costs and some are not, thus creating potential disparate treatment for offenders simply by virtue of where the infraction occurred.

On April 17, 2014, this Court entered an order accepting transfer of the appeal.

ARGUMENT

The Writ is improper for several reasons. First, KRS 186.574(6) is silent on court costs, while KRS 24A.175(1) and RCr 8.04 expressly provide for the imposition of court costs. The General Assembly could not intend to erase a provision as important to the public as court costs without expressly doing so, as demonstrated, at the very least, by its own failure this year to amend KRS 186.574(6) expressly to so provide.

Second, even if that amendment had succeeded, the statute would be unconstitutional. Court costs fall within this Court's power to be the final arbiter of practice and procedure in the administration of justice. The General Assembly's amendment to KRS 186.574 in 2012 is unconstitutional on its face and as applied. It is vague – giving virtually complete discretion to county attorneys over the content of "safety" programs and the amount of the "reasonable" fee charged. As the Court of Appeals noted, the fate of the traffic offender turns on where he or she receives a

speeding citation. In some counties, there is no safety program so court costs can indisputedly be imposed. In the 60-70 other counties that have adopted "safety" programs, there might be an on-line program or an "in person" class, and the fee can range from $0 to $175. (*See* Chart, App. G, and Report, App. H) Whether it is deemed arbitrary, void for vagueness or fundamentally unequal in treatment, the statute fails constitutional examination.

I. COURT COSTS ARE PROPERLY ASSESSED AGAINST DIVERSION DEFENDANTS BEFORE THE DISTRICT COURT.[6]

Nothing in KRS 186.574(6) prohibits the assessment of routine court costs under RCr 8.04.

A. KRS 186.574(6) Does Not Except County Attorney-Program Participants From Court Costs For Criminal Cases In District Court.

KRS 24A.175(1) provides that "[c]ourt costs for a criminal case in the District Court shall be one hundred dollars ($100), regardless of whether the offense is one for which prepayment is permitted." When it amended KRS 186.574 to allow county attorneys to operate traffic safety programs, the General Assembly did not include a provision prohibiting the imposition of any court costs that might follow a traffic offender's participation in the program. In fact, KRS 186.574(6) says absolutely nothing about what happens in court to "traffic offenders **diverted** into the county attorney-operated traffic safety program" (emphasis added). It only states that the county attorney may operate a program "prior to the adjudication of the offense," which indicates there would indeed be an ensuing court proceeding.

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[6] Appellant preserved this argument in the Response below, pages 22 through 31.

The enabling statute therefore stands in stark contrast to the County Attorney's quite publicized promises that would-be participants in Drive Safe Louisville will not have to go to court, will have their charges dismissed, and will not be assessed any statutory fines or other expenses. (*See, e.g.*, Order, Attachments #s 1, 2) It – along with the remainder of the Penal Code – also stands in stark contrast to the County Attorney's indignant affront to any judicial involvement in the ultimate resolution of traffic violation cases that appear on the court's docket.

KRS 186.574(6) does allow the County Attorney to collect an undefined reasonable fee from its program's participants, as well as a mandatory $25 fee to be paid and held in a trust by the Administrative Office of the Courts for increasing the number and salaries of deputy clerks. The Writ seizes on this provision to argue that the $25 **fee** is the only **court costs** allowed in the statute. The position is facially unavailing because a "fee" is not the $100 court costs identified in KRS 24A.175(1). The two are differentiated throughout the penal statutes. While fees are often added to court costs, they are not a substitute for them. *See, e.g.,* KRS 24A.175(4), which distinguishes "court costs, fees, and fines" and allows installment payments going "first to court costs, then to restitution, then to fees, and then to fines;" KRS 24A.176 (imposing a "fee of twenty dollars ($20)" to court costs); KRS 24A.180 ("Disposition of District Court fees and costs").

It defies reason to think that the Legislature could have intended to wipe out the statutory allocation of millions in court costs to all the organizations specifically identified in statutes with a belated amendment to KRS 186.574, particularly when a separate chapter provides for the payment of court costs, KRS 24A.175(1), and this Court's RCr 8.04 contemplates the imposition of court costs when prosecution is

suspended for "diversion." The law is clear that courts should strive to achieve harmony in the statutory law and avoid "a construction that is unreasonable and absurd, in preference for one that is reasonable, rationale, sensible and intelligent." *Commonwealth v. Fowler*, 409 S.W.3d 355, 361 (Ky. App. 2013).

As this Court has held:

> It is a familiar rule of statutory construction that inconsistent statutory provisions must be harmonized if possible and "where two constructions of a statute are possible, by one of which the entire act may be made harmonious, while the other will create discord between different provisions, the former should be adopted."

Schwindel v. Meade County, 113 S.W.3d 159, 166 (Ky. 2003) (quoting *Bischoff v. Hennessy,* 251 S.W.2d 582, 583 (Ky. 1952)). The only way to harmonize KRS 24A.175(1), and the silence in KRS 186.574(6), is to enforce court costs under RCr 8.04.

In the face of these rules of interpretation, and while simultaneously suggesting that it cannot rely on hindsight anecdotal statements from individual legislators, the Circuit Court nevertheless proceeds to accept a June 7, 2013 letter from State Representative Robert R. Damron attempting to interpret KRS 186.574(b). Ironically, even Mr. Damron has doubts. His letter implicitly acknowledges that a plain reading of the text of KRS 186.574(6) does not prohibit a presiding judge from imposing court costs, in admitting that he will sponsor future legislation to prevent such action "if it becomes an issue." It must be an "issue" because attempts to add language to prohibit court costs failed to pass the last session.

More important, this hearsay document carries no weight as a matter of law.[7] "It is a basic principle of statutory construction that legislative intent may not be garnered from parol evidence, especially parol evidence furnished by a member of the legislature, itself." *Bd. of Trustees of the Judicial Form Retirement Sys. V. Atty. Gen. of Commonwealth,* 132 S.W.3d 770, 786 (Ky. 2003). Rather, legislative intent must be ascertained by reviewing the history of the statute.

> [T]he evolution of any statute from its prior embodiments to its present state is the purist form of legislative history. This type of legislative history focuses on the actual language adopted as law by the legislature through the years, and thus avoids the nuances and biases that might appear in extra-statutory materials such as committee reports or a single legislator's post-enactments comments.

Jefferson County Bd. of Educ. v. Fell, 391 S.W.3d. 713, 723 (Ky. 2012).

Thus, courts may not vary the plain terms of a statute based on post-enactment comments made by legislators. "[A] statute may not be interpreted contrary to the stated language and . . . legislative intent must be interpreted from the language employed. Affidavits such as those of [a State Senator], setting forth his individual opinions, rather than the language adopted by the group as a whole are of little value." *Roman Catholic Bishop of Louisville v. Burden*, 168 S.W.3d 414, 417 (Ky. App. 2005) (citations omitted). In *Decker v. Russell*, 357 S.W.2d 886 (Ky. App. 1962), the Court affirmed the trial court's "disregard" of testimony from two legislators regarding the intention of a statute in question, noting that "[t]his is, indeed, a novel resort for construing a statute," and holding that "[o]f course, the testimony was disregarded by the trial court, as it is by this appellate court." *See id.* at 888. Individual opinions from legislators cannot put words in

[7] The same is true of the County Attorney's tendered Affidavit of Bill W. Patrick regarding his account of testimony at Committee meetings on KRS 186.574(6). Mr. Patrick is the Executive Director of the Kentucky County Attorney's Association.

a statute that do not exist, particularly when the General Assembly itself cannot pass a Bill to add words prohibiting court costs.

B. Court Costs Are Not Reserved For Convictions.

The language of KRS 186.574(6) notwithstanding, the Circuit Court exempts Drive Safe Louisville participants from court costs, believing that court costs may only be imposed upon a "conviction." It relies on KRS 24A.175(3), which states "[t]he taxation of court costs against a defendant, upon conviction in a case, including persons sentenced to state traffic school as provided in KRS 186.574, shall be mandatory. . . ." But that subsection says only that court costs are mandatory upon conviction; it says nothing about whether court costs may be imposed in other situations.

Again, KRS 24A.175(1) provides that "[c]ourt costs for a criminal case in the District Court shall be one hundred dollars ($100), regardless of whether the offense is one for which prepayment is permitted." Subsection (1) makes clear that court costs apply in criminal cases. Subsection (2) then carves out an express exception for parking citations and subsection (3) makes the court costs mandatory upon conviction, expressly including persons sentenced to state traffic school. The statute does not speak directly to any other situation. District Court cases involving traffic offenders, even those who have participated in Drive Safe Louisville, are clearly encompassed by subsection (1), which speaks in terms of "a criminal case," regardless of whether the offense is "one for which prepayment is permitted."

The Writ ignores the undisputed fact that court costs are routinely imposed when a defendant and the County Attorney enter into a plea agreement, or a pre-trial diversion agreement; yet, neither of those situations is specifically discussed in KRS 24A.175. Moreover, in both of those situations, the presiding judge plays a role in reaching those

agreements, exercising discretion over whether to impose certain "conditions," such as court costs. Again, RCr 8.04 provides that "the Commonwealth and the defendant may agree, **subject to the approval of the trial court,** that the prosecution will be suspended for a specified period after which it will be dismissed on the condition that the defendant not commit a crime during that period, or other conditions agreed upon by the parties" (emphasis added).

The Circuit Court states that Drive Safe Louisville is not a "diversion" program, contrary to all the evidence, to distinguish it from convictions or plea agreements. It believes that court costs may only be imposed as a part of a "sentence" upon conviction or guilty plea. But the law allows court costs to be imposed as part of a pretrial diversion program under RCr 8.04. A pre-trial diversion program interrupts a criminal prosecution so that the defendant may successfully complete the terms of the diversion agreement. Upon successful completion, the charges are then dismissed upon order of the court with any appropriate conditions, including payment of court costs. In essence, the defendant participating in diversion is being "sentenced" prior to the dismissal of the case. That sentence may be with a probationary period with no new offenses; or, it may be completing some sort of educational program like Drive Safe Louisville.

C. Court Costs Are Proper And Routinely Imposed In Pre-Trial Diversion Cases.

The Circuit Court states that Drive Safe Louisville is not a diversion program under RCr 8.04, but as a matter of fact and law, that is exactly what it is. Judge Smith's factual findings stand virtually uncontroverted.

- KRS 186.574(6)(c)(2) references participants as "traffic offenders **diverted** into the county attorney-operated traffic safety program" (emphasis added).
- At the March 22, 2013 hearing on the case, Assistant County Attorney Golden stated multiple times that Drive Safe Louisville is a "diversion program."

- Websites for numerous other County Attorneys across the Commonwealth of Kentucky identify their KRS 186.574(6) programs as diversion programs.

- DSL meets the definition for pretrial diversion under standards published by such entities as the National Association of Pretrial Services, the National District Attorneys Association, and the National Survey of Pretrial Diversion Programs and Practices.

See Order at 5-7.

RCr 8.04 applies to traffic offenses. The County Attorney argued otherwise below, but he relied on one word in a footnote in *Flynt v. Commonwealth*, 105 S.W.3d 415, 418 n.10 (Ky. 2003), and the issue here regarding KRS 186.574(6), which did not exist in 2003, could not have been before this Court in *Flynt*. The sole issue was whether a Circuit Court could permit a defendant to participate in a diversion program over the Commonwealth's objection.

The Circuit Court relied on KRS 533.250, but that statute only applies to pretrial diversion of Class D felonies in Circuit Court, not to diversion of cases in District Court. Felonies can only be tried in Circuit Court. KRS 533.262(1) provides: "The pretrial diversion program authorized by KRS 533.250 to 533.260 shall be the sole program utilized in the Circuit Courts of the Commonwealth . . . ." The next section, KRS 533.262(2), states that the only other pretrial diversion programs "shall be those authorized by the Kentucky Supreme Court . . . ." In *Flynt*, this Court considered Chapter 533 and concluded: "the 1998 Kentucky General Assembly enacted statutory provisions governing the creation of pretrial diversion programs in Kentucky's circuit courts . . . KRS 533.262 reflects the General Assembly's determination that, **although the district courts may employ other pretrial diversion programs**, the pretrial diversion authorized in the earlier statutory provisions shall be the sole program utilized

in the Circuit Courts of the Commonwealth, except for drug court . . . ." *Flynt*, 105 S.W.3d at 417-18 (emphasis added).

This Court allows diversion in District Courts under RCr. 8.04(2). It states that diversion agreements "may include conditions that could be imposed upon probation." The Rule does not require a guilty plea or a conviction for diversion in District Court. As Judge Smith observed, "Without any question court costs can be and are routinely 'imposed upon probation'" (Order at 13). She was also well within the District Court's jurisdiction under both RCr. 8.04 **and** RCr. 9.64 in withholding "approval" and "permission" for the County Attorney's motion to dismiss Mr. Higgins' case until court costs were paid.

II. INTERPRETING KRS 186.574(6) TO PROHIBIT A COURT FROM ASSESSING COURT COSTS RENDERS THE STATUTE UNCONSTITUTIONAL.[8]

Promoting below the autonomy of his Drive Safe Louisville program and his Office's self-proclaimed authority to unilaterally dismiss cases without court involvement, the County Attorney overlooked some fairly basic tenets of Constitutional law. The Circuit Court rightly rejected the idea that the Executive Branch possesses such adjudicatory powers reserved for the courts.[9] But in upholding the County Attorney's read of KRS 186.574(6) to prohibit the District Court from assessing court costs against Drive Safe Louisville offenders, the Circuit Court transformed the statute into a

[8] Appellant preserved this argument in the Response below, pages 32 through 37.

[9] It bears noting that despite the Circuit Court's Order holding that a prosecutor has no power to unilaterally dismiss a case, a holding not appealed, the County Attorney continues to promise Jefferson County traffic offenders on its website that completion of Drive Safe Louisville, along with payment of the attendant $150 fees to the County Attorney, will result in dismissal of their case. *See* www.drivesafelouisville.com.

legislative encroachment upon the judiciary in violation of the separation of powers. It also transformed the statute into one that is unconstitutionally arbitrary. Allowing court costs to be assessed against some diverted offenders but not against those that the County Attorney accepts into its Drive Safe Louisville for a fee results in an unequal, and hence arbitrary, application of law. KRS 186.574(6) should not be interpreted in a way that makes it unconstitutional.

A. Separation Of Powers Prohibits Encroachment On Judicial Authority.

> It is well settled law in the state of Kentucky that one branch of Kentucky's tripartite government may not encroach upon the inherent powers granted to any other branch. Sections 27 and 28 are "clear and explicit on this delineation." "[T]he framers of Kentucky's constitution . . . were undoubtedly familiar with the potential damage to the interests of the citizenry if the powers of government were usurped by one or more branches of that government" (citations omitted).

Elk Horn Coal Group v. Cheyenne Resources, Inc., 163 S.W.3d 408, 422 (Ky. 2005). The separation of powers "is fundamental to our tripartite system of government and must be 'strictly construed.'" *Id.* At issue in *Elk Horn* was an appeal penalty statute that this Court declared unconstitutional under the separation of powers doctrine because it encroached on the constitutional powers belonging to the judiciary. Similarly, here, accepting the County Attorney's read, KRS 186.574(6) would impermissibly encroach on judicial power by prohibiting a District Court from assessing court costs that Supreme Court Rules clearly permit.

Certainly there can be little disputing this Court's rule making power within our tripartite system. Its source is "firmly rooted within the Constitution." *Smothers v. Lewis*, 672 S.W.2d 62, 64 (Ky. 1984). Section 109 says that "The judicial power of the Commonwealth shall be vested exclusively in one Court of Justice...." Ky. Const. §109. And Section 116 of the Constitution's 1976 Judicial Article provides: "The Supreme

Court shall have the power to prescribe rules governing its appellate jurisdiction, rules for the appointment of commissioners and other court personnel, and rules of practice and procedure for the Court of Justice." Ky. Const. §116.

Incidental to its constitutional grant of power, this Court is also vested with inherent powers "to do all things reasonably necessary to the administration of justice in the case before it." *Smothers*, 672 S.W.2d at 64. "The power to conduct criminal trials, to adjudicate guilt, and to impose sentences within the penalty range prescribed by the legislature belongs to the judicial department." *Hoskins v. Maricle*, 150 S.W.3d 1, 12 (Ky. 2004) (citations omitted). *See also Craft v. Commonwealth*, 343 S.W.2d 150 (Ky. App. 1961).

> The control over this inherent power judicial power . . . is exclusively within the constitutional realm of the courts. As such, it is not within the purview of the legislature to grant or deny the power nor is it within the purview of the legislature to shape of fashion circumstances under which this inherently judicial power may be or may not be granted or denied.

Smothers, 672 S.W.2d at 64. Any legislative attempt to invade the rule-making prerogative of this Court by legislating rules of practice and procedure violates our Constitution's separation of powers doctrine. *Commonwealth v. Reneer*, 734 S.W.2d 794, 796 (Ky. 1987).

Lest there be any doubt, this Court recently reminded us that "the separation of powers provisions of our Kentucky Constitution endow this Court with a unique mandate not present in our federal Constitution." *Glenn v. Commonwealth*, ___ S.W.3d ___, 2013 WL 6145231 (Ky. 2013), 2012-SC-000499-MR. "We alone are the final arbiters of our rules of 'practice and procedure'" *Id.*

One such "rule of practice and procedure" – RCr 8.04(2) – as promulgated by this Court allows the trial court in approving dismissals in pre-trial diversion cases to order

"conditions that could be imposed upon probation," which include an assessment of court costs. As interpreted by the County Attorney and the Circuit Court, KRS 186.574(6) usurps the trial court of the power to assess court costs against participants in the County Attorney's diversion program and therefore effectively nullifies RCr 8.04(2) and with it this Court's attendant rule making power. If so interpreted, the statute is unconstitutional.

1. Statute Restricting Court's Power To Fairly Assess Court Costs Interferes With Judicial Function And Rules.

"The general rule is that any legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional." *Norton v. Commonwealth*, 37 S.W.3d 750, 754 (Ky. 2001). When such an encroachment occurs, this Court accepts its constitutional mandate as "unequivocal:"

> The creation, implementation, or amendment of our Rules of Criminal Procedure provides no basis for "joint effort," not any other constitutional quandary or quagmire.

Glenn, 2013 WL 6145231, at *2.

In *Glenn,* this Court addressed an appellant's contention that RCr. 9.40, which limits the number of peremptory challenges, involved substantive law and was therefore beyond the "practice and procedure" constitutional authority of the courts. This Court disagreed and affirmed not just the substance of RCr 9.40 but "also this Court's authority to promulgate that rule and all other rules of practice and procedure in the Commonwealth." *Id.*

This Court has rebuffed similar challenges to both its constitutional and inherent responsibility "to do all things reasonably necessary to the administration of justice in the case before it." In *Smothers*, for instance, the Court declared unconstitutional a statute that "directly locks horns" with the Court's inherent power to issue injunctions. 672

S.W.2d at 64 ("The control over this inherent judicial power, in this particular instance the injunction, is exclusively within the constitutional realm of the courts.").

Statutes limiting a court's discretion to set fines for punishing trial participants for contempt have likewise been deemed to interfere with the administration of justice and therefore unconstitutional. *Arnett v. Meade*, 462 S.W.2d 940, 948 (Ky. App. 1971); *Wade v. Commonwealth*, 712 S.W.2d 363, 364 (Ky. App. 1986). And, of course, there is *Elk Horn,* where the Court found a statute that imposed a ten percent penalty on unsuccessful appellants in second appeals restricts the appellate jurisdiction of the Supreme Court so as to invade the constitutional power assigned exclusively to the Court. "Thus, because KRS 26A.300 violates the separation of powers provisions of the Kentucky Constitution, it is unconstitutional." *Elk Horn*, 163 S.W.3d at 424.

The same can be said of KRS 186.574(6) as interpreted by the Circuit Court to prohibit a court from assessing court costs against county attorney diversion program offenders. Kentucky courts have recognized that assessment of court costs fall squarely within the Court's rule making authority. *Lang v. Sapp*, 71 S.W.3d 133, 136 (Ky. App. 2002) (". . . it is undoubtedly true that in a civil action involving private parties it is the exclusive province of the Supreme Court to determine upon which party and under what circumstances to impose costs . . ."). Further, the imposition of court costs in a criminal action is a procedural mechanism, "which in no way modifies any elements necessary to convict or penalties to be imposed upon conviction." *Taylor v. Commonwealth*, 175 S.W.3d 68, 77 (Ky. 2005).

"Procedural law" consists of "[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves." BLACKS LAW DICTIONARY (9th ed. 2009). RCr 8.04(2) is exactly such a

rule. It prescribes a step – *i.e.* a condition – that may be imposed by the Court for approval of a diversion agreement, namely payment of court costs. As the Appellant District Court noted in its original Order, diversion agreements routinely include court costs. Further, the Jefferson County Attorney routinely recommends dismissals of cases on conditions that include court costs (*see* Order at 13-14).

Judge Smith correctly recognized that "Defendants should be treated equally" (Order at 14). Treating all diverted traffic offenders - including those that are invited to participate in county attorney programs - equally with respect to court costs is imperative to the Court's inherent authority to administer justice in the case before it. Here, RCr 8.04(2) prescribes a step in the judicial approval process for diversion agreements and dismissals. And, legislative attempts to hamper or interfere are unconstitutional. Under the Circuit Court and County Attorney's interpretation, KRS 186.574(6) is unconstitutional.

2. Comity Should Not Extend To A Statute Nullifying Supreme Court Rule.

This Court has already recognized that the Legislature treads in dangerous waters with respect even to other statutes setting court costs and fees.

> Inevitably, there is and always will be a gray area in which a line between the legislative prerogatives of the General Assembly and the rule-making authority of the courts is not easy to draw. . . . There is, for example, the statute providing for disqualification of judges. . . . There is also the matter of court costs and fees. . . .

Commonwealth v. Reneer, 734 S.W.2d 794, 797 (Ky. 1987) (quoting from *Ex Parte Auditor of Public Accounts*, 609 S.W.2d 682, 688 (Ky. 1980)). Nonetheless, it is not always necessary to act upon a statute that violates separation of powers where the particular encroachment is one that can be accepted under principles of comity. *Id.* at 798.

In *Reneer*, this Court was concerned about a truth-in-sentencing statute that the Court found violated the separation of powers doctrine by invading the rule-making prerogative of the courts. The Court examined the statute and basically agreed with the procedure set forth. It therefore did not contest the law, despite its unconstitutionality. This Court was quick to add, however, that it had the power to preempt the statute with different rules of procedure at any time and explicitly "reserve[d] the right to consider any abuses or injustices alleged to be caused by [the statute] when presented by a proper case." *Id.* "[W]e accept its provisions for the time being under the principle of comity." *Id.*

No such comity can be afforded a statute such as KRS 186.574(6) that, as interpreted, presents an unreasonable interference with the orderly functioning of the courts. While this Court might agree with and therefore "accede through a wholesome comity" to other legislation that sets the amount of court costs, the beneficiaries of court costs, and that otherwise ensures court costs are fairly and equally imposed, it should definitely draw the line when the Legislature starts nullifying existing court rules and creating a class system for court costs. Under the County Attorney's quite self-serving interpretation of KRS 186.574(6), courts no longer can treat all traffic offenders equally. With respect to cases involving offenders participating in county attorney diversion programs, the courts essentially lose all adjudicatory power and the administration of justice is tied to the purse strings of an executive office. The result invites mischief and leaves an executive office without a meaningful check so important to the separation of powers doctrine.

In short, as shown in the previous argument, KRS 186.574(6) does not prohibit a court from assessing customary court costs in county attorney diversion cases. But if it did, the statute would be unconstitutional.

B. KRS 186.574(6) Violates The Prohibition Against Arbitrariness Under Ky. Const. §2.

Section 2 of the Kentucky Constitution states that arbitrary power exists nowhere in the Republic: "[W]hatever is essentially unjust and unequal or exceeds the reasonable and legitimate interests of the people is arbitrary." *Sanitation Dist. No. 1 of Jefferson County v. City of Louisville*, 213 S.W.2d 995, 1000 (Ky. 1948). "With respect to adjudications, . . . this guarantee [of freedom from arbitrary action] is generally understood as a due process provision whereby Kentucky citizens may be assured of fundamentally fair and unbiased procedures." *Com. Natural Resources and Environmental Protection Cabinet v. Kentec Coal Co., Inc.,* 177 S.W.3d 718, 724 (Ky. 2005). "Unequal enforcement of the law, if it rises to the level of conscious violation of the principle of uniformity, is prohibited by this Section." *Kentucky Milk Marketing and Antimonopoly Com'n v. Kroger Co.*, 691 S.W.2d 893, 899 (Ky. 1985).

If the Circuit Court's interpretation of KRS 186.574(6) stands, then the statute violates the prohibition against arbitrariness, so deeply rooted in our Constitution. With its enactment, the General Assembly would have deprived the citizenry of its assurance of "fair and unbiased procedures" in adjudication. All citizens who are cited for speeding violations are constitutionally entitled to application of the same procedures with respect to adjudication of their cases. But under the County Attorney's theory, citizens do not have equal access to the same procedures because KRS 186.574(6) provides a special exemption from court costs to those who choose – and can afford – to participate in a county attorney's traffic safety program.

As Judge Smith indisputably points out, the County Attorney routinely recommends dismissals of traffic citations on the condition of payment of court costs (Order at 13-14). Case number ten on Judge Smith's April 30, 2012 docket, for instance, involved a traffic citation received by Defendant Joseph Brooks. Judge Smith dismissed Mr. Brooks' citation pursuant to the prosecutor's recommendation, as the District Court has done on so many other occasions with respect to defendants receiving the "dismiss if no new tickets" deal. Mr. Brooks – like Mr. Higgins – took advantage of a diversion program to obtain dismissal of his citation. But Mr. Brooks – unlike Mr. Higgins – had to pay court costs.

As already discussed, courts routinely impose court costs pursuant to diversion agreements. Participants in a county attorney-sponsored traffic safety program should be treated just like all other diversion programs. The Citizenry has a reasonable expectation that people will be treated similarly when subject to our court system. "[I]t may be said that whatever is contrary to democratic ideas, customs, and maxims is arbitrary. Likewise, whatever is essentially unjust and unequal or exceeds the reasonable and legitimate in trusts of the people is arbitrary."[10] *Kentec,* 177 S.W.3d at 726 (internal

[10] *See also Pritchett v. Marshall*, 375 S.W.2d 253, 258 (Ky. App. 1964) (The prohibition against arbitrariness found in Section 2 of the Kentucky Constitution is a "concept [the courts] consider broad enough to embrace both due process and equal protection of the laws, both fundamental fairness and impartiality."). The arbitrariness of KRS 186.574(5) presents a serious equal protection concern. As applied, it discriminates against the class of persons who cannot afford to participate in a county attorney-sponsored traffic safety program – a point that Judge Smith noted in her Order at page 18. A law must be ruled unconstitutional if the classification drawn by it is not rationally related to a legitimate state interest. *See City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 442 (1985); *Weiand v. Board of Trustees of Ky. Retirement Sys.*, 25 S.W.3d 88, 92 (Ky. 2000). And as the United States Supreme Court has warned, "arbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988). There is simply no legitimate interest for discriminating against eligible participants who (continued...)

quotations omitted). To the extent KRS 186.574(6) provides an exemption for the payment of court costs, it is unconstitutional – as it violates the prohibition against arbitrariness found in Section 2 of the Kentucky Constitution.

Moreover, the county attorney programs across the Commonwealth are markedly different. The Court of Appeals observed in its opinion recommending transfer to this Court, "some counties are assessing court costs and some are not, thus creating potential disparate treatment for offenders simply by virtue of when the infraction occurred" (App. C). This consequence in application should not be constitutionally permissible. "The courts will strike down as vague statutes written in a manner that encourages arbitrary and discriminatory enforcement." *Craig v. Kentucky State Bd. For Elementary and Secondary Educ.*, 902 S.W.2d 264, 268 (Ky. App. 1995). (*See also* discussion *infra* in Section II, C.) This Court can certainly construe KRS 186.574(6) as allowing the imposition of court costs, consistent with RCr 8.04; but if this Court accepts the interpretation in the Writ, it should invalidate KRS 186.574(6) on its face as void and in application as arbitrary.

(...continued)

wish to participate in county attorney-sponsored traffic safety programs on the basis of economic status. Any eligible citizen should have equal access to these traffic safety programs. "It is just not within our democratic ideas, customs, or maxims to grant equal justice and due process only to those who can afford to pay and to deny such right to those who cannot." *Weiand*, 25 S.W.3d at 92 (striking down regulation that required permit holders to prepay assessments in order to obtain formal hearing" contest of violation.).

C. KRS 186.574(D) Is Void For Vagueness.

Finally, it is a bedrock principle of Kentucky law, and American law in general, that statutes cannot be vague and confusing. Statutes that are confusing are *void ab initio*:

> [W]here the law-making body, in framing the law, has not expressed its intent intelligibly, or in language that the people upon whom it is designed to operate or whom it affects can understand, or from which the courts can deduce the legislative will, the statute will be declared to be inoperative or void.

Bd. of Trustees of Judicial Form Retirement Sys., 132 S.W.3d at 778 (quoting *Folks v. Barren County*, 232 S.W.2d 1010, 1013 (Ky. 1950)). Thus, for at least one hundred years, Kentucky's courts have invalidated statutes that are "so carelessly drawn that it is impossible to determine just what the author intended." *Id.* at 779. When laws are vague, a court "cannot supply omissions or remedy defects in matters committed to the legislature. A legislative act which is so vague, indefinite and uncertain that the courts are unable, *by accepted rules of construction*, to determine, with any reasonable degree of certainty, what the legislature intended . . . will be declared inoperative and void." *Id.* (emphasis in original).

"A statute is vague if people of common intelligence must necessarily guess at its meaning. A statute is impermissibly vague if it is written in a manner that encourages arbitrary and discriminatory enforcement. In examining a statute for vagueness, we should not supply words in order to make it constitutional if it is intelligible on its face." *Walker v. Kentucky Dept. of Educ.*, 981 S.W.2d 128, 131 (Ky. App. 1998) (internal citations omitted). KRS 186.574(6) is unconstitutionally vague, as it provides no clear direction to the county attorneys with respect to how to set up their traffic safety programs, or what fee to charge. It merely provides that:

A county attorney that operates a traffic safety program:

1. May charge a reasonable fee to program participants, which shall only be used for payment of county attorney office operating expenses; and

2. Shall, by October 1 of each year, report to the Prosecutors Advisory Council the fee charged for the county attorney-operated traffic safety program and the total number of traffic offenders diverted into the county attorney-operated traffic safety program for the preceding fiscal year categorized by traffic offense.

It sets forth no parameters with regard to the substance or the procedure of the program, leaving a multitude of questions to be answered. Should the program be administered in a classroom setting? Online? Via DVD? What general topics should be addressed in the program? How long should the program run? If the program is administered online or via DVD, can the identity of the participant be verified? Can it be verified that the participant actually read/watched the program? What are the criteria for a "passing score?" Are there provisions in place to deal with participants who do not pass the test? What are the parameters of a "reasonable" fee? What if eligible participants are not able to pay the fee charged by their respective county attorney-sponsored program? Is the fee to the county attorney a fee in lieu of court costs? What does the phrase "county attorney office operating expenses" mean? Does that restrict use of the fees to the actual costs or "operating expenses" of the safety program itself? May the County Attorney use the funds to pay an outside vendor, as he is doing in Jefferson County? May he use the funds to cover other "operating expenses" of his office, aside from those related to the safety program? Surely the General Assembly did not intend to give the County Attorney's office a windfall of unrestricted funding at the expense of the worthy entities who receive the statutorily-allocated court costs.

These questions illustrate how vague KRS 186.574(6) is. Kentucky citizens who commit the same traffic offense in different counties may see materially divergent results with respect to the penalty for that offense. "[S]ome counties are assessing court costs and some are not, thus creating potential disparate treatment for offenders simply by virtue of where the infraction occurred" (App. C).

Another way of describing it may be that KRS 186.574 is an unconstitutional delegation of legislative power by giving the County Attorney near unbridled discretion in creating traffic safety programs. Pursuant to the Ky. Const. § 29, the power to legislate lies solely within the province of the General Assembly. While this provision does not expressly prohibit the General Assembly from delegating its power to other entities, Kentucky courts consistently reaffirm the constitutional prohibition preventing the General Assembly from delegating its powers.[11] *Bloemer v. Turner,* 137 S.W.2d 387, 391 (Ky. 1940) ("[T]he legislative department has no right to deputize to others the power to perform its governing functions.); *Legislative Research Com'n By and Through Prather v. Brown,* 664 S.W.2d 907, 914 (Ky. 1984) (holding the legislature could not delegate its authority to make laws as this power is solely and exclusively legislative in nature).

The vagueness in KRS 186.175(6) leaves individual county attorneys unchecked with respect to how they establish their programs, not even providing as much as a basic verification requirement. And, while the statute requires a "reasonable" fee, there appears to be no check on what "reasonable" means. Currently, the range is $0 to $175

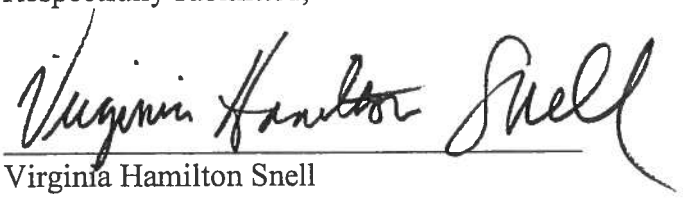
[11] "[M]ere broad generalizations with regard to health, safety, morals and general welfare," are not specific enough standards to justify a delegation of authority. *Snyder v. Owensboro,* 528 S.W.2d 663, 664 (Ky. 1975).

(Report, App. H). "The courts will . . . strike down as vague statutes written in a manner that encourages arbitrary and discriminatory enforcement." *Craig v. Kentucky State Bd. For Elementary and Secondary Educ.*, 902 S.W.2d at 268. KRS 186.574(6) is void for vagueness.

CONCLUSION

The General Assembly could not have intended to erase other statutes and authority granted in this Court's Rules through an amendment of afew sentences that say nothing about "court costs," which are so important to the Spinal Cord and Head Injury Trust Fund, the Traumatic Brain Injury Trust Fund, the Crime Victims' Compensation, the Jefferson County Sheriffs' the Circuit Clerks, the local police departments and the Cabinet for Health and Family Services, all of which receive a portion of the court costs paid. And, even if the Legislature can be said to have done so in KRS 186.574(6), it did so badly, in violation of the Kentucky Constitution. Judge Smith acted squarely within her authority under RCr 8.04. We respectfully urge this Court to revise and set aside the Writ.

Respectfully submitted,



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